

# EXHIBIT A

THE HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,  
  
Plaintiff,  
  
vs.  
  
MOTOROLA, INC., et al.,  
  
Defendants.

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MOTOROLA MOBILITY LLC, et al.,  
  
Plaintiffs,

vs.  
  
MICROSOFT CORPORATION,  
  
Defendants.

Case No. C10-1823-JLR

DEFENDANT MOTOROLA  
MOBILITY'S, FIRST SET OF  
INTERROGATORIES AND  
REQUESTS FOR PRODUCTION TO  
PLAINTIFF MICROSOFT  
CORPORATION AND  
**MICROSOFT CORPORATION'S  
MAY 21, 2013 SUPPLEMENTAL  
ANSWER TO INTERROGATORY  
NO. 3**

Pursuant to Fed. R. Civ. P. 26(e), and all applicable Local Rules, Microsoft Corporation ("Microsoft") hereby submits the following supplemental answer to Motorola Mobility LLC's ("Defendant's" or "Motorola's") Interrogatory No. 3.

**MICROSOFT'S MAY 21, 2013  
SUPPLEMENTAL ANSWER TO  
INTERROGATORY NO. 3 - 1**

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**GENERAL OBJECTIONS**

Microsoft hereby incorporates the General Objections set forth in its initial and April 3, 2013 supplemental answers to Motorola's first set of Interrogatories and Requests for Production as though set forth herein. Those General Objections are incorporated into the specific objections to each Interrogatory set forth below.

**INTERROGATORY NO. 3:** State the factual basis for any contention underlying Microsoft's claim that Motorola's October 21, 2010 and October 29, 2010 Letter constituted a breach or other violation of a commitment to license patents on reasonable and non-discriminatory terms.

**ANSWER:** Microsoft incorporates by reference each of its General Objections as though set forth herein. Microsoft further objects that this is a premature contention interrogatory. Microsoft is not obligated to respond to premature contention interrogatories until the parties have substantially completed discovery.

Subject to and without waiving these objections, Microsoft answers that, in willful disregard of the commitments Motorola made to IEEE and the ITU-T, Motorola has refused to extend to Microsoft a license consistent with Motorola's promises for any of Motorola's allegedly "essential" patents. Instead, Motorola is demanding royalty payments that are wholly disproportionate to the royalty that its patents should command under any reasonable calculus. Motorola has discriminatorily chosen Microsoft's Xbox product line and other multi-function, many-featured products and software, such as Windows 7 and Windows Phone 7 and products incorporating Microsoft software, for the purpose of extracting unreasonable royalties from Microsoft that are inconsistent with Motorola's obligation to offer licenses for the relevant patents on RAND terms and conditions.

In further response, Microsoft states as follows:

**MICROSOFT'S MAY 21, 2013  
SUPPLEMENTAL ANSWER TO  
INTERROGATORY NO. 3 - 2**

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1 Motorola's October 21, 2010 Letter

2 By letter to Microsoft, dated October 21, 2010, Kirk Dailey, Motorola's Corporate Vice  
3 President Intellectual Property, offered to license "Motorola's portfolio of patents and pending  
4 applications having claims that may be or become Essential Patent Claims (as defined in  
5 section 6.1 of the IEEE bylaws) for a compliant implementation of the IEEE 802.11  
6 Standards." Motorola offered to license the relevant patents under terms and conditions that  
7 included a "royalty of 2.25% per unit for each 802.11 complaint product[.]" Motorola stated  
8 that the royalty "is calculated based on the price of the end product (e.g., each Xbox 360  
9 product) and not on component software."

10 The cost of the chips and associated components that provide wireless connectivity for  
11 Xbox 360 consoles is a small fraction of the overall cost of the device. Moreover, Microsoft  
12 sells its Xbox 360 consoles at a number of prices. Each console includes approximately the  
13 same chips and associated components for wireless connectivity, providing the same level of  
14 relevant functionality. Motorola thus seeks a royalty on components of Xbox 360 that is  
15 disproportionate to the value and contribution of its purportedly "essential" patents and has  
16 declined to offer a license to its purported "essential" patents unless it receives exorbitant and  
17 discriminatory royalty payments to which it is not entitled. On information and belief,  
18 Motorola has not previously entered into a license agreement for its purported "essential"  
19 patents that is comparable to the demand made of Microsoft. Motorola has thereby refused to  
20 offer to license the patents at a reasonable rate, with reasonable terms, under conditions that are  
21 demonstrably free of any unfair discrimination.

22 The royalty demanded by Motorola falls well outside the boundaries of a reasonable  
23 and non-discriminatory royalty and therefore violates the commitment Motorola made to the  
24 IEEE and its members.  
25

1 Participants in IEEE-SA standards setting efforts, including those directed to WLAN  
2 technology, were subject to the IEEE-SA Standard Board Bylaws concerning the submission  
3 of Letters of Assurance related to patent claims deemed “essential” by a submitting party.  
4 Clause 6 of those Bylaws (which was revised slightly over the years) generally provides in  
5 pertinent part:

6 A Letter of Assurance shall be either:

7 a) A general disclaimer to the effect that the submitter without conditions will  
8 not enforce any present or future Essential Patent Claims against any person or  
9 entity making, using, selling, offering to sell, importing, distributing, or  
10 implementing a compliant implementation of the standard; or

11 b) A statement that a license for a compliant implementation of the standard  
12 will be made available to an unrestricted number of applicants on a worldwide  
13 basis without compensation or under reasonable rates, with reasonable terms  
14 and conditions that are demonstrably free of any unfair discrimination.

15 Motorola openly and publicly submitted Letters of Assurance pursuant to Clause 6 of  
16 the IEEE-SA Standards Board Bylaws that it would offer to license any of its patents essential  
17 to the applicable WLAN standard(s) to any entity under reasonable rates on a non-  
18 discriminatory basis. IEEE-SA and its participants and affiliates relied on Motorola’s promises  
19 in developing, adopting and implementing IEEE-SA technical standards. These standards are  
20 now implemented worldwide in a variety of electronic devices that have become  
21 commonplace.

22 Microsoft invested substantial resources in developing and marketing products in  
23 compliance with these standards, relying on the assurances of participating patent holders –  
24 including Motorola – that any essential patents held by such patent holders would be available  
25 for licensing by implementers of the standards on such terms.

By way of non-limiting example, each Xbox device includes substantial software and  
many computer chips and modules that perform various functions, including enabling Xbox’s

1 core functionality as a video gaming machine. Of those, the Xbox console includes one – an  
2 interface provided to Microsoft by third-parties – that allows consumers optionally to connect  
3 an Xbox to the Internet using a WLAN connection.

4 The third-party WLAN interface does not enable any of Xbox's core video gaming  
5 functionality. In addition, Microsoft allows consumers an alternative, wired method to connect  
6 to the Internet. This alternative method does not require use of any WLAN technology.

7 On information and belief, Motorola obtained rights to several of the WLAN patents it  
8 has represented as "essential" through its recent acquisition of Symbol Technologies, Inc.  
9 ("Symbol").

10 Prior to the releases of the 802.11 protocols, Motorola and Symbol submitted Letters of  
11 Assurance to the IEEE pursuant to Clause 6 of the IEEE-SA Standards Board Bylaws with  
12 respect to those protocols, guaranteeing that any "essential" patents would be licensed under  
13 reasonable and non-discriminatory terms and conditions. Both Motorola's and Symbol's  
14 Letters of Assurance apply to any "essential" patents they then held as well as any other  
15 "essential" patents they subsequently obtained.

16 In reliance on these letters of assurance, IEEE released the 802.11 standard and various  
17 amendments to that standard that Motorola asserts incorporated Motorola's and Symbol's  
18 patented technology. On information and belief, once Motorola and Symbol disclosed that  
19 they likely held essential patents, absent a licensing commitment from them to the effect that  
20 they would offer licenses to "essential" patents on reasonable and non-discriminatory terms  
21 and conditions, the relevant IEEE working groups would have either revised the standards,  
22 employing alternative technologies instead, stopped working on the protocols or taken other  
23 actions.

24 In submitting its Letter of Assurance pursuant to the applicable IEEE IPR policy,  
25 Motorola entered into an actual or implied contract with IEEE, for the benefit of IEEE

1 members and any entity that implements the 802.11 standard. Motorola is bound by its  
2 agreements to offer licenses consistent with the referenced IEEE bylaws.

3 Similarly, Symbol, in submitting its Letter of Assurance pursuant to the applicable  
4 IEEE IPR policy, entered into an actual or implied contract with IEEE, for the benefit of IEEE  
5 members and any other entity that implements the 802.11 standard, and Motorola is bound by  
6 that commitment.

7 Motorola broke its promise to IEEE-SA and its members and affiliates by refusing to  
8 offer to Microsoft a license that is consistent with Motorola's Letter(s) of Assurance and  
9 Clause 6 of the IEEE-SA Standards Board Bylaws, instead demanding royalties that are  
10 excessive and discriminatory.

11 Motorola's October 29, 2010 Letter

12 By letter to Microsoft, dated October 29, 2010, Kirk Dailey, Motorola's Corporate Vice  
13 President Intellectual Property, offered to license "Motorola's portfolio of patents and pending  
14 applications covering the subject matter of ITU-T Recommendation H.264[.]" Motorola  
15 offered to license the relevant patents under terms and conditions that included a "royalty of  
16 2.25% per unit for each H.264 complaint product[.]" Motorola stated that the royalty "is  
17 calculated based on the price of the end product (e.g., each Xbox 360 product, each PC/laptop,  
18 each smartphone, etc.) and not on component software (e.g., Xbox 360 system software,  
19 Windows 7 software, Windows Phone 7 software, etc.)."

20 The cost of such component software and any inter-related hardware is a small fraction  
21 of the overall cost of the listed devices. Moreover, Microsoft sells products having H.264  
22 related capabilities at a wide range of prices, without regard to the significance of such H.264  
23 related capabilities to the primary or expected use of the products. Motorola thus seeks a  
24 royalty on software and hardware components of Xbox 360 and other devices that are  
25 unrelated to its identified patents and has declined to offer a license unless it receives

1 exorbitant royalty payments to which it is not entitled. On information and belief, Motorola  
 2 has not previously entered into a license agreement for its identified patents that is comparable  
 3 to the demand made of Microsoft. Motorola has thereby refused to offer to license the patents  
 4 at a reasonable rate, with reasonable terms, on a non-discriminatory basis.

5 The royalty demanded by Motorola falls well outside the boundaries of a reasonable  
 6 and non-discriminatory royalty and therefore violates the commitment Motorola made to the  
 7 ITU and its members.

8 Participants in ITU-T standards setting efforts, including those directed to H.264  
 9 technology, were subject to the ITU-T Common Patent Policy concerning the submission of  
 10 Patent Statement and Licensing Declarations related to patents identified by a submitting party.  
 11 The ITU-T Common Patent Policy generally provides, in pertinent part, that a patent holder's  
 12 statement may declare that:

13 (2.1) The patent holder is willing to negotiate licenses free of charge with other  
 14 parties on a non-discriminatory basis on reasonable terms and conditions.

15 (2.2) The patent holder is willing to negotiate licenses with other parties on a  
 16 non-discriminatory basis on reasonable terms and conditions.

17 Motorola openly and publicly submitted Patent Statement and Licensing Declarations  
 18 pursuant to the ITU-T's Common Patent Policy that it would offer to license any of its patents  
 19 essential for the relevant H.264 Recommendation(s) to any entity under reasonable rates on a  
 20 non-discriminatory basis. The ITU-T and its participants and affiliates relied on Motorola's  
 21 promises in developing, adopting and implementing the ITU-T H.264 Recommendations (or  
 22 standards). These standards are now implemented worldwide in a variety of electronic devices  
 23 and software that have become commonplace. Microsoft invested substantial resources in  
 24 developing and marketing products in compliance with these standards, relying on the  
 25 assurances of participating patent holders – including Motorola – that any “essential” patents

1 held by such patent holders would be available for licensing by implementers of the standards  
2 on such terms.

3 In submitting its Patent Statement and Licensing Declarations pursuant to the  
4 applicable ITU-T policy, Motorola entered into an actual or implied contract with the ITU-T,  
5 for the benefit of ITU-T members and any entity that implements the H.264 technologies.  
6 Motorola is bound by its agreements to offer licenses consistent with the referenced ITU-T  
7 Common Patent Policy.

8 Microsoft has participated in the development of the 802.11 and H.264 standards.  
9 Microsoft and other companies participating in the development of these standards relied on  
10 Motorola's commitments to ensure that the royalties Motorola would seek would conform to  
11 the promises made by Motorola.

12 In reliance on the integrity of the SDO process and the commitments made by Motorola  
13 and others regarding 802.11 patents they deem "essential," Microsoft began providing its Xbox  
14 video game consoles with WLAN connectivity. By way of example, Microsoft purchased and  
15 incorporated into its Xbox 360 video game consoles third-party-manufactured interfaces that  
16 provide Xbox 360 devices with WLAN connectivity. Microsoft made its decision to provide  
17 its Xbox video game consoles with WLAN connectivity in reliance on, and under the  
18 assumption that, it and/or any third party supplier could avoid patent litigation and take a  
19 license to "essential" patents that Motorola, or any other company submitting a Letter of  
20 Assurance, holds with regard to the WLAN standard under IEEE's well publicized IPR policy.

21 Microsoft and other manufacturers of WLAN-compliant devices necessarily relied on  
22 the assurances of participating patent holders – including Motorola – that any "essential"  
23 patents held by such patent holders would be available for licensing by implementers of the  
24 standards on such terms.  
25

1 Correspondingly, in reliance on the integrity of the SDO process and specifically the  
2 commitments made by Motorola and others regarding patents related to H.264 technologies,  
3 Microsoft began providing its H.264 technology capability in its Xbox video game consoles.  
4 Microsoft made its decision to provide its Xbox video game consoles with H.264 technology in  
5 reliance on, and under the assumption that, it and/or any third party supplier could avoid patent  
6 litigation and take a license to any “essential” patents held by Motorola, or any other company  
7 submitting a Patent Statement and Licensing Declaration, under the ITU-T’s well-publicized  
8 IPR policy.

9 Microsoft made similar investments in other fields, including Windows 7 and Windows  
10 Phone 7, based upon Motorola’s representations in relation to the H.264 technology standards.  
11 Microsoft and other manufacturers and suppliers of H.264 compliant technology necessarily  
12 relied on the commitments of Motorola and others to license their “essential” patents under  
13 these terms.

14 By way of non-limiting example, each personal computer running Windows 7 includes  
15 substantial software and many computer chips and modules that perform various functions,  
16 including those related to the general operation of a computing device. Of those, each personal  
17 computer includes just a portion directed to H.264 technologies.

18 By way of further non-limiting example, each smartphone running Windows Phone 7  
19 includes substantial software and many computer chips and modules that perform various  
20 functions, including those related to the general and particularized operation of a smartphone  
21 independent of H.264 technology. Of those, each smartphone includes just a portion directed  
22 to H.264 technologies.

23 Motorola broke its promise to the ITU-T and its members and affiliates by refusing to  
24 offer to Microsoft a license that is consistent with Motorola’s Patent Statement and Licensing  
25

1 Declaration(s) and the Common Patent Policy of the ITU-T, instead demanding royalties that  
2 are excessive and discriminatory.

3 **SUPPLEMENTAL RESPONSE OF APRIL 3, 2013:**

4 Motorola committed to license its standard essential patents on RAND terms. This  
5 meant that Motorola had to make a license available to any implementer of the standards.  
6 Offers made to prospective licensees had to be commercially reasonable. Motorola could not  
7 seek injunctive relief instead of entering into a license on RAND terms, especially in  
8 circumstances where its license offers were not commercially reasonable. In addition,  
9 Motorola was subject to a duty of good faith and fair dealing in licensing and offering to  
10 license its standard essential patents.

11 As a consequence of these contractual obligations undertaken by Motorola, Motorola  
12 breached its RAND commitments in at least the following respects. Motorola's breach is not  
13 limited to the October 2010 demand letters.

- 14 • Motorola's October 2010 demand letters did not offer licenses to Microsoft on  
15 RAND terms, and, to the contrary, were commercially unreasonable and  
16 facially outrageous; Motorola improperly sought the holdup value of its patents  
17 rather than their RAND value and improperly sought a royalty on the entire  
18 market value of products, which included many components and features for  
19 which Motorola was not entitled to any compensation.
- 20 • Motorola improperly sought injunctive relief in the ITC, the district courts and  
21 Germany instead of honoring its commitment to make licenses available on  
22 RAND terms. Repeated judicial and administrative rulings specific to Motorola  
23 have confirmed that its pursuit of injunctive relief was improper, including  
24 Judge Posner's June 22, 2012 determination that Motorola could not obtain  
25 injunctive relief on its 802.11 standard-essential patents; the Court's November  
29, 2012 order enjoining Motorola from seeking injunctive relief against  
Microsoft with respect to Motorola's H.264 and 802.11 standard essential patent  
portfolios; and the January 3, 2013 FTC consent order prohibiting Google and  
Motorola from obtaining or enforcing injunctive relief on standard-essential  
patents during the pendency of district court's resolution of a request for a  
RAND determination. As the FTC explained, the consent order barring  
Motorola from pursuing injunctive relief targeted "breaches by Google and its

1 subsidiary [Motorola] of Motorola's commitments to license standard-essential  
 2 patents ('SEPs') on terms that are fair, reasonable and non-discriminatory  
 3 ('FRAND')." Statement of the Federal Trade Commission, *In the Matter of*  
 4 *Google Inc.*, FTC File No. 121-0120 (Jan. 3, 2013).

- 5 • Motorola declined to offer a license to Microsoft's chip supplier Marvell (which  
 6 requested a license for the specific benefit of Microsoft) on RAND terms that  
 7 would cover product shipped to Microsoft and acted in a way that was both  
 8 unreasonable and discriminatory.
- 9 • Once Motorola was acquired by Google and Microsoft had a right to a license to  
 10 Motorola's H.264 standard essential patents by virtue of Google's participation  
 11 in the MPEG-LA AVC pool, Motorola refused to grant a license on those terms,  
 12 which would have complied with the RAND commitment.
- 13 • Motorola violated the covenant of good faith and fair dealing by reason of all of  
 14 the actions recited above, whether considered separately or collectively, on an  
 15 objective standard.
- 16 • Motorola also violated the covenant of good faith and fair dealing because it  
 17 knew it was acting, and intended to act, inconsistently with the covenant of  
 18 good faith and fair dealing by virtue of the actions recited above and the  
 19 following additional indicia of intent:
  - 20 ○ Motorola's objective from the beginning was to secure crippling  
 21 injunctive relief in some forum so that Microsoft would be deterred from  
 22 seeking compensation for Motorola's infringement of Microsoft's non  
 23 standard essential patents in Motorola's Android phones. Motorola's  
 24 demand letters in October 2010 were intended to set forth offers that it  
 25 knew no reasonable company would accept.
  - In furtherance of the pursuit of injunctive relief, Motorola stated that the  
 offers in the demand letters would remain open for only 20 days.
  - At the time that the demand letters were sent, Motorola had never  
 entered into a license with anyone for its H.264 or 802.11 standard  
 essential patents that was remotely comparable to the terms of the  
 demand letter
  - Motorola understood the financial implications of the demand letter,  
 including that it would be compensated for components and features as  
 to which it had no patents.

- 1           ○ Motorola sought injunctions knowing that the terms in its October 2010
- 2           demand letters would be unacceptable to Microsoft and would not be
- 3           accepted.
- 4           ○ Motorola demanded that Marvell pay royalties on the end product sales
- 5           of its downstream customers even though no one had ever agreed to pay
- 6           royalties to Motorola on this basis.
- 7           ○ Motorola discriminated against Marvell and Microsoft by excluding
- 8           chips sold to Microsoft from the license offered to Marvell.
- 9           ○ Motorola in league with its parent company Google evaded the
- 10          requirements of the MPEG-LA AVC pool agreement.

11           **MICROSOFT'S SUPPLEMENTAL RESPONSE OF MAY 21, 2013:**

12           Based on the Findings of Fact and Conclusions of Law issued in this matter on April

13           19, 2013, Motorola's demands in its letters of October 21 and 29, 2010 and its offer to Marvell

14           were so far from offers made on RAND terms that Motorola was in breach of its RAND

15           obligations.

16           Motorola's demands were so excessive that they constituted an effective refusal to deal

17           under Motorola's contractual commitments to the ITU and IEEE. No reasonable company

18           would have accepted the terms and conditions demanded by Motorola, and the excessive

19           nature of the demands demonstrated that they were simply sham offers.

20           Further, by making demands that were so far removed from RAND, Motorola violated

21           its duty of good faith and fair dealing. Not only would no reasonable company have accepted

22           the terms and conditions demanded by Motorola, but Motorola could not have reasonably

23           expected that they would have been accepted. Nor were the offered terms and conditions a

24           reasonable or legitimate basis for negotiating to a lower RAND royalty. By making these

25           demands, Motorola was signaling that it intended to seek a hold-up royalty from Microsoft.

          Indeed, Motorola has stated that it expects consideration equal to a 2.25% royalty for any

1 portfolio of standard essential patents; the only point of negotiation is about the form – not the  
2 value – of consideration.

3 Although Microsoft does not believe that it is required to prove an absence of good  
4 faith on the part of Motorola in order to establish a breach of the RAND obligation, there is  
5 abundant evidence that Motorola was not acting in good faith in making its demands to  
6 Microsoft and Marvell. The offers were a sham and intended as a predicate to filing lawsuits  
7 and seeking injunctions and exclusion orders on standard essential patents. This conduct is  
8 consistent with a strategy of hold-up, the very conduct that RAND commitments seek to  
9 prevent. The ultimate goal of Motorola's conduct was to pressure Microsoft into relinquishing  
10 its rights under non-standard essential patents by threatening or securing injunctions on  
11 Motorola's standard essential patents with devastating consequences. Motorola understood  
12 that it was improper and inconsistent with RAND obligations to seek to use the hold-up power  
13 of its standard essential patents to demand grantback rights under a putative licensee's non-  
14 standard essential patents, but nevertheless pursued this course.

15 At least the following facts and circumstances demonstrate that Motorola breached its  
16 RAND commitments in its contract with the IEEE regarding the 802.11 WiFi standard.  
17 Further, at the time Motorola sent its October 21, 2010 demand letter and at the time of its  
18 offer to Marvell relating to Motorola's 802.11 essential patents, Motorola was or should have  
19 been aware of at least the following in addition to matters set forth in prior responses:

20 Motorola has claimed that 2.25% was its standard offer for any portfolio of its  
21 standard essential patents, but it had no legitimate basis for selecting that rate  
22 for its 802.11 essential patents.

23 Motorola had committed to licensing its 802.11 patents at a nominal  
24 competitive royalty.

25 No claim charts had been prepared showing that all of the patents claimed by  
Motorola to be essential to 802.11 were, in fact, essential.

1 No one had ever agreed to a license to Motorola's 802.11 essential patents,  
2 alone, at a royalty rate of 2.25%.

3 A large number of companies had submitted letters of assurance to the IEEE in  
4 connection with 802.11 and if each of those companies demanded a royalty of  
5 2.25%, the total royalty would have been in excess of 200%, a royalty that was  
6 patently unreasonable and not viable from a business standpoint.

7 Motorola failed to take into account royalty stacking in setting a rate of 2.25%  
8 for its 802.11 essential patents, either in connection with royalties due other  
9 owners of 802.11 essential patents or owners of patents essential to other  
10 standards.

11 Motorola had no evidence that its 802.11 essential patents had any greater value  
12 than those of other owners of standard essential patents.

13 Motorola was aware of the rates charged by the Via 802.11 pool and had no  
14 knowledge that its own 802.11 essential patents had any greater value than  
15 those of pool members.

16 Although from an economic perspective, a RAND commitment limits a patent  
17 holder to a reasonable royalty on the economic value of its patented technology  
18 itself, apart from the value associated with incorporation of the patented  
19 technology into the standard, Motorola made no attempt to determine this  
20 economic value with respect to its 802.11 essential patents.

21 Although the actual value provided by an essential patent is its incremental  
22 contribution in comparison to alternatives that would have provided the same or  
23 a similar technical contribution, Motorola made no attempt to value its 802.11  
24 essential patents in this way.

25 Motorola had in its possession an analysis of reasonable royalties for its 802.11  
essential patents conducted by InteCap in 2003, but made no use of that in  
reaching the conclusion that it would seek 2.25% for its 802.11 patents.  
Motorola was aware that 802.11 functionality is substantially embodied in  
commodity chipsets that sell for a few dollars and that its demanded 2.25%  
royalty for Xbox consoles is exorbitant in light of the economics.

Microsoft had a right to a license to allow its making, using, and selling of  
802.11-compliant products pursuant to Motorola's contractual obligations to the  
IEEE, either directly or indirectly. Marvell was similarly entitled to a license,  
whether specific to its sales to Microsoft or otherwise.

A license to Marvell that covered its 802.11 chips as supplied to Microsoft  
would have exhausted Motorola's 802.11 standard-essential patents vis-à-vis

1 Microsoft. Motorola's express refusal to extend a license to Marvell that would  
2 have covered its sales of 802.11 chips/chipsets to Microsoft was effectively a  
3 refusal to license Microsoft on RAND terms and conditions, and was expressly  
4 discriminatory with respect to Microsoft.

5 Marvell could not maintain a viable business model by paying 802.11 royalties  
6 in excess of the cost of its chipsets on the end product prices charged by its  
7 customers or others downstream.

8 At least the following facts and circumstances demonstrate that Motorola breached its  
9 RAND commitments in its contract with the ITU regarding the H.264 video coding standard.  
10 Further, at the time Motorola sent its October 29, 2010 demand letter relating to Motorola's  
11 H.264 essential patents, Motorola was or should have been aware of at least the following in  
12 addition to matters set forth in prior responses:

13 Motorola has claimed that 2.25% was its standard offer for any portfolio of its  
14 standard essential patents, but it had no legitimate basis for selecting that rate  
15 for its H.264 essential patents.

16 No claim charts had been prepared showing that all of the patents claimed by  
17 Motorola to be essential to H.264 were, in fact, essential.

18 Motorola's role in H.264 development related almost entirely to interlaced  
19 video and its H.264 essential patents are almost entirely directed to interlaced  
20 video; interlaced video was of little importance to Microsoft's products.

21 No one had ever agreed to a license to Motorola's H.264 essential patents,  
22 alone, at a royalty rate of 2.25% of the price of the compliant end product.

23 No one had ever agreed to pay Motorola a royalty based on the price of  
24 products sold by its customers or others downstream.

25 A large number of companies had submitted letters of assurance to the ITU in  
connection with H.264 and if each of those companies demanded a royalty of  
2.25%, the total royalty would have been in excess of 100%, a royalty that was  
patently unreasonable and not viable from a business standpoint.

Motorola failed to take into account royalty stacking in setting a rate of 2.25%  
for its H.264 essential patents, either in connection with royalties due other  
owners of H.264 essential patents or owners of patents essential to other  
standards.

1 Motorola had no evidence that its H.264 essential patents had any greater value  
2 than those of other owners of standard essential patents.

3 Motorola was aware of the rates charged by the MPEG LA H.264 pool and that  
4 2.25% was exorbitant in light of the number of patents included in the pool  
5 license; in addition, Motorola had no knowledge that its own H.264 essential  
6 patents had any greater value than those of pool members.

7 Motorola was aware that it had participated in the negotiations regarding the  
8 formation of the MPEG LA H.264 pool, had agreed to the rates the pool  
9 ultimately adopted, and had authorized the use of its name in announcing the  
10 finalization of those rates to the public.

11 Although from an economic perspective, a RAND commitment limits a patent  
12 holder to a reasonable royalty on the economic value of its patented technology  
13 itself, apart from the value associated with incorporation of the patented  
14 technology into the standard, Motorola made no attempt to determine this  
15 economic value with respect to its H.264 essential patents.

16 Although the actual value provided by an essential patent is its incremental  
17 contribution in comparison to alternatives that would have provided the same or  
18 a similar technical contribution, Motorola made no attempt to value its H.264  
19 essential patents in this way.

20 DATED this 21<sup>st</sup> day of May, 2013.

21 CALFO HARRIGAN LEYH & EAKES LLP

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**CERTIFICATE OF SERVICE**

I, Emma Chapman, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 21<sup>st</sup> day of May, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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DATED this 21<sup>st</sup> day of May, 2013.

s/ Emma Chapman  
EMMA CHAPMAN